3-23-2009

Jorgensen v. Coppedge Respondent's Brief Dckt. 35575

IN THE SUPREME COURT OF THE STATE OF IDAHO

BRIAN JORGENSEN d.b.a. MEDICINE MAN PHARMACY and MEDICINE MAN PHARMACY, INC., an Idaho corporation, **Plaintiffs-Respondents,** **vs.** **C. MICHAEL COPPEDGE and KAREN COPPEDGE, individually and as the last Board of Directors and shareholders of ACOLOCY PRESCRIPTION COMPOUNDING, INC., a dissolved Idaho corporation,** **Defendants-Appellants.**	**SUPREME COURT NO. 35575**

RESPONDENTS' BRIEF

Appeal from the District Court of the First Judicial District
of the State of Idaho in and for the County of Kootenai

Honorable John T. Mitchell, District Judge presiding

Charles R. Dean, Jr.
Dean & Kolts
1110 West Park Place, Ste. 212
Coeur d'Alene, ID 83814
Telephone: (208) 664-7794
Facsimile: (208) 664-9844

Attorneys for Appellants

Susan P. Weeks
James, Vernon & Weeks, P.A.
1626 Lincoln Way
Coeur d'Alene, ID 83814
Telephone: (208) 667-0683
Facsimile: (208) 664-1684

Attorneys for Respondents

TABLE OF CONTENTS

TABLE OF CASES AND AUTHORITIES

State Cases

Idaho Statutes

Idaho Appellate Rules

Idaho Rules of Civil Procedure

Idaho Rules of Evidence

I. STATEMENT OF THE CASE

This case is on appeal before this court a second time following the issued in *Jorgensen v. Coppedge,* 145 Idaho 524, 181 P.3d 45 (2008). The case was remanded with direction to the trial court to dismiss Jorgensen's complaint with prejudice.

On remand, Coppedges submitted a motion and notice of motion to fix attorneys fees and an accompanying memorandum of costs and attorneys fees. (LR p. 16-22).[1] Jorgensen filed a motion to disallow costs and attorney fees. Jorgensen asserted Coppedges were not the prevailing party because they failed to prevail on their counterclaims. Alternatively, Jorgensen argued that should the trial court apportion costs and fees, any fees awarded to Coppedges should be minimal in light of the fact that their counsel had researched the unenforceability issue in April and May 2005, which would have terminated Jorgensen's claim, but did not raise the issue until trial. (LR p. 49-54).

In response to Jorgensen's motion, Coppedges filed an opposition memorandum claiming they were the prevailing party when one considered the amounts involved in the litigation. Coppedges also urged the trial court to consider settlement negotiations in its assessment of the prevailing party.

In response to the apportionment issue, Coppedges claimed it was a combination of Jorgensen's complaint and demand for jury trial, accompanied by Jorgensen's failure to recognize that the covenant was unenforceable which caused the delay in the interpretation of the contract.[2] LR p. 55-70. At the hearing on the motion to disallow, Coppedges also claimed that Jorgensen's allegation in the complaint that the agreement

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[1] Plaintiffs have adopted Defendants use of "LR" to refer to the "limited" Clerk's Transcript and "LTr" to refer to the "limited" Reporter's Transcript per this Court's Order Augmenting Record issued August 22, 2008.

[2] Jorgensen did not demand the jury trial. Coppedges demanded it in their answer. R p. 14.

was a franchise agreement prevented them from having the covenant not to compete clause interpreted as a matter of law by the court sooner.[3] LTr p. 20, L. 20-25; p. 21, L. 1-14.

In ruling upon Jorgensen's motion to disallow costs and attorneys fees, the district court found that Coppedges were not the prevailing party. In its ruling given in open court on July 9, 2008, the district court held:

> THE COURT: All right. Thank you, Ms. Weeks. Well, I am going to grant the motion to disallow costs and attorney's fees. Well, costs are awarded as a matter of right, but the attorney's fees, that's discretionary, and I am granting the motion to disallow attorney's fees for two reasons. First of all, I agree that even though it was the plaintiffs that brought the case and the defendants are responding, the defendants brought counterclaims that they chose to file, and they vigorously pursued that, and it might have only been a thousand dollars of attorney's fees, I don't know, but time was spent at trial dealing with those counterclaims, and the defendants did not prevail on those, **so I'm viewing this as a split decisions and that there is no prevailing party.**
>
> The other reason I am reluctant to award attorney's fees on behalf of the defendant following the remittitur and the Supreme Court's decision, it really focused on the covenant and the overbreadth nature of it, that wasn't raised until just before trial, a week before trial or it might be two weeks, whenever the pretrial brief is due, but I have a vague recollection that didn't discuss that until we actually got into trial, and I may have well had a better shot at making the right decision regarding that issue if it wasn't in the heat of trial, and according to the Supreme Court I missed the boat, and I'll take my medicine and trust them that they're right, and I feel badly that fees were expended by both parties after that decision of mine during trial, but you know, I think had this been something that was raised in a separate motion, summary judgment motion or motion to dismiss prior to really being in the throws (sic) of trial, I think I can do my job better, and I'm not criticizing defense for the timing of the motion. It's just that –
>
> Ms. Dean (sic): Can I add something to that, Your Honor?
>
> THE COURT: Let me explain my ruling. And I think it would be unfair to basically put all the freight for that timing, and again, I'm not

[3] Jorgensen's complaint did not claim the agreement was a franchise. Rather, the sales agreement itself, attached to the complaint, indicated that Acology was purchasing all interest in the compounding division and accepting a "franchise" position under the terms of the agreement.

> faulting the defense for that timing, but at this point it does seem to me to be unfair to saddle the plaintiff with all fees really for the whole litigation if the timing were different it may be that we wouldn't have even had a trial, and so that's – that's the alternative reason.
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> LTr p. 18 L. 2-25; p. 19 L. 1-21. (Emphasis added.)

The trial court proceeded to analyze Coppedges' request that he utilize settlement negotiations to determine the prevailing party and declined to do so based upon I.R.E. 408. LTr p. 19, L. 19-25; p. 20, L. 1-18.

II. ADDITIONAL ISSUE ON APPEAL I.A.R. 35(b)(4)

1. May the trial court allow costs to party pursuant to I.R.C.P. 54(d)(1)(B) without awarding attorney fees to the same party?

III. STANDARD OF REVIEW

The standard of review of a trial court's determination of a prevailing party was enunciated in *Rockefeller v. Grabow*, 139 Idaho 538, 545, 82 P.3d 450 (2003), wherein this court held:

> The determination of who is the prevailing party in a lawsuit is committed to the sound discretion of the trial court, and its determination will not be disturbed absent an abuse of that discretion. *Bolger v. Lance*, 137 Idaho 792, 53 P.3d 1211 (2002). In making a determination of whether a trial court abused its discretion, this Court considers: (1) whether the trial court correctly perceived the issue as one of discretion; (2) whether the trial court acted within the boundaries of this discretion and consistent with the legal standards applicable to the specific choices available to it; and (3) whether the trial court reached its decision by an exercise of reason. *Polk v. Larrabee*, 135 Idaho 303, 17 P.3d 247 (2000).

IV. ARGUMENT

A. Legal Standards

It is not disputed that this matter falls within the ambit of I.C. § 12-120(3) for the analysis of an award of attorney fees. In the recent case of *Shore v. Peterson,* ___ Idaho

____, ___ P.3d ___, 2009 WL 540542 (2009), this Court provided a comprehensive analysis of the determination of a prevailing party in an action and held:

> A prevailing party in an action is entitled to certain costs as a matter of right and may, in some cases, also be awarded discretionary costs and attorney fees. Idaho R. Civ. P. 54(d)(1). A determination on prevailing parties is committed to the discretion of the trial court. *Eighteen Mile Ranch, LLC v. Nord Excavating & Paving, Inc.*, 141 Idaho 716, 718-19, 117 P.3d 130, 132-33 (2005). Idaho Rule of Civil Procedure 54(d)(1)(B) guides courts' inquiries on the prevailing party question. *Id.* at 719, 117 P.3d at 133. That rule provides:
>
> > In determining which party to an action is a prevailing party and entitled to costs, the trial court shall in its sound discretion consider the final judgment or result of the action in relation to the relief sought by the respective parties. The trial court in its sound discretion may determine that a party to an action prevailed in part and did not prevail in part, and upon so finding may apportion the costs between and among the parties in a fair and equitable manner after considering all of the issues and claims involved in the action and the resultant judgment or judgments obtained.
>
> Idaho R. Civ. P. 54(d)(1)(B). In determining which party prevailed where there are claims and counterclaims between opposing parties, the court determines who prevailed "in the action"; that is, the prevailing party question is examined and determined from an overall view, not a claim-by-claim analysis. *Eighteen Mile*, 141 Idaho at 719, 117 P.3d at 133.
>
> Only in rare cases has this Court or the Court of Appeals reversed a trial court's determination of which party prevailed. In *Eighteen Mile*, we reversed the trial court's determination that although the defendants had successfully defended against plaintiff's complaint, because they recovered only a small portion of what they desired on their counterclaim, they were not prevailing parties. *Id.* at 719, 117 P.3d at 133. In that case we emphasized that a defendant's non-liability is evidence that it is the prevailing party. In *Daisy Manufacturing Co. v. Paintball Sports, Inc.*, 134 Idaho 259, 999 P.2d 914 (Ct.App.2000), the Court of Appeals observed: "The 'result obtained' in this case was a dismissal of [plaintiff's] action with prejudice, the most favorable outcome that could possibly be achieved by [a defendant]. [The plaintiff] gained no benefit as a consequence of the litigation." *Id.* at 262, 999 P.2d at 917. Those cases illustrate that a defendant may be the prevailing party when he or she is ultimately found not liable.

> When both parties are partially successful, however, it is within the court's discretion to decline an award of attorney fees to either side. *Israel v. Leachman*, 139 Idaho 24, 27, 72 P.3d 864, 867 (2003). In *Israel*, the plaintiffs prevailed on their claim under the Idaho Consumer Protection Act, but did not prevail on their claims for breach of contract, statutory violations, and fraud. Id. at 25-26, 72 P.3d at 865-66. We affirmed the district court's decision to award no attorney fees because it determined that both parties prevailed in part. *Id.* at 28, 72 P.3d 864, 72 P.3d at 868.
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> The district court's determination of who is a prevailing party will not be disturbed absent an abuse of discretion. *Trilogy Network Sys., Inc. v. Johnson*, 144 Idaho 844, 847, 172 P.3d 1119, 1122 (2007). When examining whether a trial court abused its discretion, this Court considers whether the trial court: (1) perceived the issue as one of discretion; (2) acted within the outer boundaries of this discretion and consistently with the legal standards applicable to the specific choices available to it; and (3) reached its decision by an exercise of reason. *Id.* (affirming the trial court's decision that each party bear its own costs in a case where a plaintiff successfully showed a breach of contract, but failed to provide adequate evidence to show damages that were not mere speculation.)

B. Coppedges are not Entitled to Attorney Fees as a Matter of Right because the Trial Court Allowed them Costs

In this matter, Jorgensen timely objected to an award of costs and attorney fees to Coppedges on the grounds that they were not the prevailing party. LR p. 49-51. In the alternative, Jorgensen contended that if the trial court apportioned attorney fees that any apportionment to Coppedges should be minimal and challenged specific court costs claimed by Coppedges. LR p. 51-53.

Following the hearing on the matter, the trial court determined that neither party prevailed in the matter and declined to award attorney fees to either. The trial court determined that neither party prevailed because both unsuccessfully pursued claims against the other. The trial court articulated the basis of its decision, citing to the final judgment and result of the action in relation to the relief sought by each of the respective parties and determined there was no prevailing party. LTr p. 18, L. 1-16.

Coppedges do not attack the trial court's ruling in this portion of its appeal. Rather, they point to the fact that at the same time as the court disallowed the attorney fees requested as costs because there was no prevailing party, it allowed Coppedges' costs in the amount of $600. LTr p. 18, L. 1-16; p. 22, L 7-11.

Despite the trial court's specific finding at the hearing that Coppedges were not a prevailing party, which finding was incorporated into the court's order entered in this matter, Coppedges contend on appeal that they were found to be a prevailing party and are therefore entitled to costs.[4] Coppedges cite to no authority for this proposition. Instead, Coppedges contend that because the trial court awarded them court costs as a matter of right that they are the prevailing party in the matter notwithstanding the direct finding by the court enunciated at the hearing to the contrary.

Coppedges' position on appeal ignores the specific findings of the trial court that Coppedges were not the prevailing party. In partial support of their argument, Coppedges point out that Jorgensen did not file a cross-appeal in this matter and conclude that their position as a prevailing party is therefore established. In essence, Coppedges argue that Jorgensen may not raise the specific findings of the court enunciated at the hearing and incorporated into its written order because he did not file a cross-appeal in this matter. Coppedges conclude that based upon the fact that there was no cross appeal that this Court must ignore the trial court's specific ruling that Coppedges were not a prevailing party and rule on appeal that they are entitled to attorney fees as a matter of right.

Jorgensen was not required to raise the specific findings of the Court, which are incorporated in the written order, as an issue on a cross-appeal. Pursuant to I.A.R. 15, a

[4] LR p. 78

respondent is required to file a cross-appeal if affirmative relief by way of reversal, vacation or modification of the judgment is sought. Idaho Appellate Rule 15(a) provides in relevant part that: "If no affirmative relief is sought by way of reversal, vacation or modification of the judgment, order or decree, an issue may be presented by the respondent as an additional issue on appeal under Rule 35(b)(4) without filing a cross-appeal." In *Miller v. Board of Trustees*, 132 Idaho 244, 970 P.2d 512 (1998), this Court recognized that a respondent can make any argument to sustain a lower court's judgment without filing a cross-appeal. Concomitantly. I.A.R. 35(b)(4) provides in the event the respondent contends that the issues presented on appeal listed in appellant's brief are insufficient, incomplete, or raise additional issues for review, the respondent may list additional issues presented on appeal in the same form as prescribed in Rule 35(a)(4).

Coppedges issues are insufficient, incomplete and raise additional issues for review because Coppedges choose to ignore the trial court's analysis and specific finding, which were incorporated into its written order, that there was no prevailing party in this matter. Further, Coppedges fail to address the specific language of I.R.C.P. 54(d)(1)(B) which allows the trial court to apportion costs between parties when they have prevailed in part and not prevailed in part in a manner it deems fair and equitable. In fact, Idaho case law supports that the trial court may award costs as a matter of right to both parties in an action on those causes upon which the party prevailed. *See Ramco v. H-K Contractors, Inc.*, 118 Idaho 108, 113, 794 P.2d 1381, 1386 (1990). Instead, Coppedges rely upon the fact that they deem the order internally inconsistent and therefore ask this Court to deem them a prevailing party in direct contradiction of the trial court's finding.

This request is inconsistent with the standards set out in *Shore v. Peterson, supra* and *Ramco v. H-K Contractors, Inc., supra.*

C. The Trial Court did not Abuse its Discretion when it Determined that Neither Party Prevailed

Coppedges claim that the trial court abused its discretion in this matter by finding there was no prevailing party for two reasons. The first is that Coppedges won on the main issue in the case. The second is that the counterclaims would have been advanced as affirmative defenses and therefore the time devoted to the counterclaims was insignificantly different than the time that would have been devoted to the counterclaim.

1. Coppedges did not Prevail on the Main Issue in the Case

Turning to the first claim, Coppedges vaguely define the "main issue" in the case as the issue that brought the parties to court without further analysis. The issue that brought the parties to court was a sales agreement. It contained covenants not to compete applicable to both Jorgensen and Coppedges which this Court ruled were unenforceable reciprocal covenants.

Throughout the litigation, both sides claimed the other had breached their covenant not to compete and claimed there were damages from the breaches.[5] In addition, Coppedges claimed fraud in the inducement and sought damages for that claim.

Coppedges claim on appeal that they prevailed on "the only claim that mattered in the case, a claim Jorgensen valued at well over a million", and the trial court abused its discretion by failing to recognize this fact. Coppedges' counterclaims were not insignificant. Coppedges indicated in their trial brief filed approximately one week

[5] Even though Coppedges claimed that their covenant not to compete was unenforceable, they never took that position with respect to Jorgensen's covenant. At no time did they express any intent to withdraw their claims that this covenant had been breached.

before trial that part of the damages they were seeking included the return of payments they made on the contract over the course of three (3) years.[6] Coppedges also advanced a new basis for their claim of breach of contract, claiming that discovery they received allegedly revealed Jorgensen had breached the sales agreement by retaining customer lists and customer information contained in retained computer data and using the information in violation of the sales agreement. Coppedges reiterated that they sought a refund of all the money he paid Jorgensen over the course of the contract. R 55-71. Coppedges valued their counterclaims to the jury at a minimum of $452,000. Tr Vol. III, p. 1157 L. 6-8; Vol. III, p. 1198, L. 4-23; Vol. III p. 1205, L. 23-25; p. 1206, L. 1-3.

As to the trial of the counterclaims, the trial court observed that Coppedges vigorously pursued their counterclaims at trial. LTr p. 18, L. 12-14. It was not an abuse of discretion for the trial court to consider that these counterclaims were as relevant to the case as Jorgensen's claims.

Coppedges claim that the inappropriate consideration of their counterclaims by the trial court in its prevailing party analysis placed them in the same position as the prevailing defendants in *Eighteen Mile Ranch, LLC v. Nord Excavating & Paving, Inc.*, 141 Idaho 716, 117 P.3d 130 (2005), *and Chadderdon v. King.*, 104 Idaho 406, 659 P.2d 160, (Ct. App.1983) and was therefore error. Coppedges characterize these two cases as ones where defendants defeated plaintiffs' claims even though they either lost or secured a Pyrrhic victory on their counterclaims and yet were still deemed prevailing parties.

[6] In the figures that Coppedges provided the trial court at hearing of the attorney time devoted to the counterclaims, no mention was made of time devoted in discovery to the counterclaims or time devoted to address them in the trial brief, yet it is apparent in the record that they were addressed in the trial brief, and the trial brief referenced discovery done on the counterclaims.

Neither *Eighteen Mile* nor *Chadderdon* support Coppedges' position. In *Eighteen Mile,* some of the defendants were dismissed from the case and one of the defendants avoided liability on plaintiffs claim and recovered a small amount on a counterclaim. The *Eighteen Mile* court overruled the trial court's finding that the defendants were not prevailing parties, noting that the trial court failed to appreciate that avoiding a verdict was as important as winning a verdict. Coppedges are not in the same position. Although they may have avoided a verdict against them, they brought and pursued counterclaims and lost on their counterclaims.

As to the claim that *Chadderdon* applies in this matter to support a finding of abuse of discretion, this case analyzed a contract clause allowing costs and fees to the prevailing party in an action between a building owners and a contractor. The owner did not prevail in his suit against the builder. The builder did not prevail in his counterclaim against the owner. The owner urged a narrow interpretation of prevailing party rule to only apply if affirmative relief was awarded. The trial court rejected this interpretation, finding that the owner's claim was the main issue of the case that consumed the majority of the time at trial, and the builder was the prevailing party. The *Chadderdon* court agreed that the narrow interpretation advanced by the owner was not appropriate and affirmed the trial court.

Chadderdon certainly stands for the proposition that the trial court may review the case and the issues heard at trial and determine which ones were the main issues in its prevailing party analysis. However, it does not stand for the proposition that plaintiff's claims are always the main issue at trial or that defendant's counterclaims are always

minor issues. Rather, it discusses an analysis that has to be made in each case by the trial court based upon the facts of that specific case.

Apparently, Coppedges desire a mathematical approach to the prevailing party analysis. Since their claim was smaller, they deem that their issues were not main issues. However, the determination of which party has prevailed is not a matter of a mechanical measurement of the size of each party's respective recovery. *Ramco v. H-K Contractors, Inc.*, 118 Idaho 108, 113, 794 P.2d 1381, 1386 (1990).

2. Affirmative Defenses and Defensive Counterclaims

Coppedges downplay the role of their counterclaims at trial to support their claim that the trial court abused its discretion in its prevailing party analysis by not taking this factor into consideration. They contend the evidence they presented would have been admitted anyway as part of their affirmative defenses anyway. At the hearing, Coppedges counsel informed the trial court that the time he had worked on pleadings for the affirmative defenses was minimal, stating, "...so I can tell you in going through the bills that I can't find more than a thousand dollars of time that was related to the event that were – the counterclaim itself, and that would be the additional jury instructions that were done and drafting of the counterclaim itself." LTr p. 11, L. 10-19. In response to this argument, during delivery of the trial court's opinion, it noted that "...the defendant brought counterclaims that they chose to file, and they vigorously pursued that, and it might have only been a thousand dollars of attorney's fees, I don't know, but time was spent at trial dealing with those counterclaims..." LTr p. 18, L. 9-14. Thus, the trial court reached its decision regarding the importance of the counterclaims to the case through an exercise of reason based in part upon what it observed at trial of the matter.

Coppedges also claim the trial court abused its discretion by failing to take into consideration in its analysis the fact that their counterclaims were incorporated into their affirmative defenses. Coppedges cite to no authority nor do they present any argument in support of their claim that a trial court abuses its discretion in reviewing counterclaims that might have also been plead as affirmative defenses in its analysis of the prevailing party. Further, I.R.C.P. 54(d)(1)(B) does not list this factor as one that is to be considered by the trial court in its determination of the prevailing party, and it was not an abuse of discretion for the trial court to follow the rule.

Further, the fact that some of Coppedges claims may have been compulsory counterclaims is of no weight. In *Hutchinson v. Kelton*, 99 Idaho 866, 590 P.2d 1012 (1979) the defendant on appeal claimed that it was error for the trial court to consider in its prevailing party analysis the outcome of the defendant's compulsory counterclaims because they were required to bring them. After reviewing the applicable rule and standards, the *Hutchinson* court ruled that the trial court committed no error in considering the outcome on the compulsory counterclaims as part of its prevailing party analysis.

3. There was no Abuse of Discretion

In reviewing the trial court's decision on the prevailing party, this Court first inquires if the trial court perceived the matter as one of discretion. The court's ruling demonstrates it did.

The next inquiry is whether the trial court acted within the boundaries of this discretion and consistent with the legal standards applicable to the specific choices available to it. Despite Coppedges position that it was entitled to a ruling that it was a

prevailing party because plaintiff did not prevail on its claim against Coppedges, in *International Engineering Co. Inc. v. Daum Indus., Inc.,* 106 Idaho 363, 679 P.2d 640 (1984) this Court held where plaintiff prevailed on some claims and defendant prevailed on a counterclaim, the trial court did not abuse its discretion in holding that there was no prevailing party. Similarly, in *Shore v. Peterson, supra,* this Court also held that when both parties are partially successful that it is within the court's discretion to decline an award of attorney fees to either side. Thus, the trial court in this matter acted within the boundaries of its discretion and consistent with applicable legal standards.

The final inquiry is whether the trial court reached its decision by an exercise of reason. In this matter, the trial court's ruling shows it was guided by considerations in the rule governing the determination of prevailing party status. I.R.C.P. 54(d)(1)(B). The trial court looked at the claims involved, the final judgment or result, and the extent to which each party prevailed on the claims. Thus, this prong is also met. The trial court did not abuse its discretion in determining that there was no prevailing party.

D. Coppedges Inappropriately Request that this Court Remove the Discretion Granted the Trial Court's pursuant to Rule 54(d)(1)(B)

In the portion of their brief seeking fees without apportionment, Coppedges request that should this Court remand the issue of attorney fees to the trial court that it include instructions in the remand to the trial court that it may not exercise its discretion pursuant to I.R.C.P. 54(d)(1)(B) and apportion fees. Fundamentally, Coppedges ask this Court to place itself in the shoes of the trial court and determine that Coppedges were the prevailing party. Coppedges claim such action is necessary because the comments of the trial court made it clear in the present case that it was denying Coppedges attorney fees to vindicate its sense of justice beyond the judgment rendered. This claim is without merit.

The trial court made clear that it was finding that neither party prevailed and as such, an award of attorney fees was not warranted. The court chose to address the apportionment arguments raised by Coppedges as an alternative. The trial court did not need to address this matter as it had already found that neither party prevailed. Thus, this Court need not address this issue on appeal.

Should this Court decide to review the trial court's comments as requested on appeal, these comments do not indicate that the trial court was employing its own view of equity to determine Coppedges entitlement to an award. Rather, they were directed toward why the court was not apportioning considering the factors required by Rule 54(e)(3), I.R.C.P.

The trial court indicated it would not have ordered apportionment of fees because Coppedges did not bring pre-trial motions, such as a motion to dismiss [for failure to state a claim upon which relief could be granted] or a motion for summary judgment which might have prevented the matter proceeding to trial. LTr p. 17 L. 17-25; p. 18, L. 1-21.

In a footnote to their appellate brief, Coppedges claim the trial court should not have considered the failure to bring timely pre-trial motions in addressing the amount to award utilizing the factors of Rule 54(e)(3). Coppedges claim they should not bear any responsibility for the failure to bring timely pre-trial motions. (Appellant's Brief p. 7-8.)

In their submittal to the trial court on the issue, Coppedges claimed they could not have raised the issue of unenforceability by summary judgment because it would have first required the Court to decide whether the contract created a franchise as plaintiffs

initially alleged in their complaint. LR p. 57.[7] The issue of franchise was not raised in the complaint, however franchise language was contained in the agreement.

Regardless, this argument was undercut by Coppedges own trial brief. In Coppedges' trial brief, Coppedges cited to case authority and proposed to the court that the contract was not enforceable as a franchise as a matter of law. R p. 63. Along the same lines, Coppedges' trial brief also argued to the court that the clause requiring the $12,000 monthly payment was an "illegal" covenant not to compete and was unenforceable as a matter of law. R p. 63-70. Thus, the trial court could have determined these issues short of trial. Yet Coppedges never brought any pre-trial motions.

Coppedges claim that because the trial court expressed an opinion that the amount of fees were not reasonable given the lack of such pre-trial motions that the trial court clearly decided to deny an award as a means to vindicate its sense of justice beyond the judgment rendered in violation of the holding of *Eighteen Mile Ranch, LLC v. Nord Excavating & Paving, Inc.*, 141 Idaho 716, 720, 117 P.3d 130, 134 (2005). However, the comment of the court was a comment on what the court deemed a reasonable apportionment in light of Coppedges' ability to potentially have terminated the litigation sooner through pre-trial motion practice. Contrary to Coppedges claim, the trial courts action was not a denial of attorney fees with an equitable view toward the outcome of the underlying transaction as was prohibited in *DeWils Interiors, Inc. v. Dines*, 106 Idaho 288, 678 P.2d 80 (Ct. App. 1984).

[7] The issue of franchise was not raised in the complaint, however franchise language was contained in the agreement.

In awarding fees to an attorney, it is proper for the court to evaluate whether the time and labor actually expended by an attorney was reasonable under the circumstances. In *Daisy Mfg. Co., Inc. v. Paintball Sports, Inc.*, 134 Idaho 259, 263, 999 P.2d 914, 918 (Ct.App.2000), the trial court was concerned that the prevailing party did not inform the opponent until the eve of trial that it was not the proper party. The Court of Appeals held, "An attorney cannot 'spend' his time extravagantly and expect to be compensated by the party who loses at trial. Hence, a court may disallow fees that were unnecessarily and unreasonably incurred or that were the product of attorney 'churning.'" The Court of Appeals indicated it was reasonable for the trial court to look at this factor in determining the reasonableness of fees, but not in determining which parties prevailed.

E. The Coppedges are not Entitled to Attorney Fees Without Apportionment

Coppedges argue that if this matter is remanded back to the trial court, they are entitled to an instruction that fees are not to be apportioned. In essence, Coppedges argue that this Court should deem them the prevailing party contrary to the trial court's ruling. Coppedges base this argument on two premises.

The first premise is that their counterclaims should have been disregarded by the trial court in its prevailing party analysis because they were defensive in nature. This argument has been previously dealt with at length in this brief under section IV.C.2. To summarize that section, there is no authority for the proposition that it was error for the trial court not to consider this factor. Even if it was error for the trial court not to consider this factor in its prevailing party analysis, there is no basis or authority for this court removing the trial court's discretion on a remand to prevent the trial court from correcting its error and properly exercising its discretion.

The other premise is that the trial court erred by not considering settlement negotiations as part of its prevailing party analysis. Coppedges really do not provide any explanation why this court should remand with a directive that the trial court can not exercise its discretion if the trial court abused its discretion.

Coppedges claim the trial court committed error because it would not consider affidavits regarding settlement negotiations which they submitted in support of their attorney fee request and therefore the case should be remanded with directions that there be no apportionment. Coppedges claims that such evidence has been allowed in other cases to determine an award of attorney fees.

Coppedges rely upon *Etcheverry Sheep Co. v. J.R. Simplot Co.,* 113 Idaho 15, 18 (1985) for the proposition that a district court is not precluded from considering pretrial settlement negotiations in determining whether the criteria of I.R.C.P. 54(e)(1) have been established. While acknowledging this holding applied to awards under I.C. § 12-120, Coppedges argue this Court should extended this holding to a request for attorneys' fees under I.C. § 12-120(3). The portion of *Etcheverry* quoted by Coppedges comes from *Sigdestad v. Gold, 106 Idaho 693,* 682 P.2d 646 (Ct. App. 1984).

Both *Etcheverry, supra,* and *Sigdestad, supra,* have been overruled. In *Severson v. Hermann,* 116 Idaho 497, 777 P.2d 269 (1989), the plaintiff asserted that the trial court abused its discretion in holding that matters extrajudicial to a jury trial could constitute grounds for an award of attorney's fees. In analyzing the issue, the court held:

> Hermann notes that in *Etcheverry Sheep Co. v. J.R. Simplot Co.*, 113 Idaho 15, 18, 740 P.2d 57, 61 (1987) we stated that a "district court is not precluded from considering pretrial settlement negotiations in determining whether the criteria of Rule 54(e)(1) have been established." 113 Idaho at 18, 740 P.2d at 60-61. In light of *Anderson v. Anderson*, 116 Idaho 359,

775 P.2d 1201, (1989), *Etcheverry* is not authority for the trial court to consider matters outside the record. In *Anderson* we explained that:

> Just last year this Court reasserted our earlier holding in *Payne v. Foley*, 102 Idaho 760, 639 P.2d 1126 (1982), that in determining whether or not to award attorney fees under I.C. § 12-121 the trial courts may not consider the extent of any settlement negotiations which the parties may or may not have engaged in. In *Ross v. Coleman*, 114 Idaho 817, at 836, 761 P.2d 1169, at 1188 (1988), this Court quoting from *Payne* stated, "There is no authority in a trial court to insist upon, oversee, or second guess settlement negotiations, if any, and certainly no authority to impose sanctions for 'bad faith' bargaining." *Ross v. Coleman* overruled *Sigdestad v. Gold* sub silento. We again affirm our holdings in *Payne v. Foley*, and *Ross v. Coleman*, i.e., "that the failure to enter into or conduct settlement negotiations is not a basis for awarding attorney fees under I.C. § 12-121 and I.R.C.P. 54(e)(1)." Id. The language in *Sigdestad v. Gold*, 106 Idaho 693, 682 P.2d 646 (Ct.App.1984), to the contrary is in error and is expressly disapproved.

Id. at 277.

Given the above analysis, it would not be appropriate to extend *Etcheverry* to claims under I.C. § 12-120(3).

Coppedges claim that *Yellowpine Water User's Assn't v. Imel,* 105 Idaho 349 (1983) is in accord with *Etcheverry* because a pre-litigation tender of an amount owing was discussed in the case. In making their argument that *Yellowpine* stands for the proposition that a trial court can utilize settlement negotiations in determining a prevailing party, Coppedges do not recognize the distinction between a tender of an amount that a party admits is owed and a settlement offer.

In *Yellowpine*, Imel never disputed that he owed a bill of $26 and he tendered that amount before litigation. Yellowpine was awarded that amount in the litigation. Yellowpine did not recover the remainder of the amount it claimed was owed in its complaint. Imel did not recover on his consumer protection act counterclaim. Citing to

Hutchinson v. Kelton, 99 Idaho 866, 590 P.2d 1012 (1979), the *Yellowpine* court concluded that Yellowpine was not a prevailing party in the action. Thus, it is important to review the holding of *Hutchinson.*

In *Hutchinson v. Kelton, supra,* the plaintiffs sought $15,178.47 in damages. The defendants counterclaimed for $89,000 damages. The plaintiffs admitted to owing $50 for payment toward preparation of a lease. The jury found against the plaintiffs on their complaint and against the defendants on their counterclaim. Defendants sought attorney fees based upon the successful defense against plaintiffs claim and the recovery of the $50 plaintiffs admitted was owed. The trial court indicated it would be an abuse of discretion to find that defendants were the prevailing party under the circumstances of the case.

On appeal, the *Hutchison* court observed that "[t]he thrust of the defendants' contention is that they did recover $50 on one of their causes of action in their counterclaim whereas, the plaintiffs recovered nothing, and that they successfully defended against the plaintiffs' complaint. As to their loss on their counterclaim, they explain that the counterclaim was compulsory in nature, and utilized as a defensive measure." After reviewing the standards of I.R.C.P. 54(d)(1)(B), the *Hutchinson* court affirmed the trial court's decision.

Rather than supporting Coppedges position, *Yellowpine, supra,* and *Hutchinson, supra,* support a denial of the appeal in this matter. Neither case looked outside the trial record to determine the prevailing party. Further, the *Hutchinson* court was unpersuaded that it should disregard the defendants' losses because they were defensive in nature (i.e. compulsory counterclaims). The appellate court upheld the trial courts' determination

that there was no prevailing party because of the failure of the plaintiffs to substantially prevail on their claim and the failure of the defendants to substantially prevail on their claim. Based upon these rulings, the trial court in the present case did not commit error in determining neither party prevailed.

Finally, Coppedges claim that the same result as was obtained in *Yellowpine Water User's Ass'n, supra,* occurred in *Medical Recovery Services, LLC v. Jones,* 145 Idaho 406, 175 P.3d 795 (Ct. App. 2007). This is not true. *Medical Recovery Services* dealt with completely different issues. As discussed previously, the *Yellowpine* court was analyzing the prevailing party based upon results sought and results obtained in litigation. The *Medical Recovery Services* court was dealing with whether attorney fees were necessarily and reasonably incurred following admission of the alleged amount owed in the complaint and payment thereof within four days of receipt of the complaint.

In *Medical Recovery Services,* the magistrate was not analyzing settlement offers made in the case in light of the results obtained to determine if the party prevailed. Rather, he was dealing with a situation where the defendant did not dispute the allegations of the complaint that a debt was owed and paid the debt within four days of service of the suit. The defendant requested to be provided the amount of attorney fees so those also could be paid. Rather than supplying the figure for payment, the attorney prepared pleadings to obtain attorney fees. The trial court disallowed a large portion of the fees, finding they had been incurred after payment of the debt and an offer to tender the attorney fees, and therefore were not reasonably incurred. On appeal, the attorney claimed the magistrate should not have considered the payment of the debt and the tender of the attorney fees, and also claimed the court was vindicating its sense of justice beyond

the judgment rendered. The *Medical Recovery Services* court agreed that it was proper for the trial court to consider that the majority of the attorney work occurred after admission and payment of the debt as a I.R.C.P. 54(e)(3) factor because a majority of the work was unrelated to litigating the debt. The greater part of the time was devoted to collecting attorney fees after the fact, which work could have been avoided by providing the debtor the requested figures to pay the debt.

The *Medical Recovery Services* court did not hold that the court could consider settlement negotiations in determining how to apportion fees in a prevailing party analysis as Coppedges claim, nor did it determine that settlement negotiations were an appropriate factor to consider under I.R.C.P. 54(e)(3). It merely indicated when a claim was not disputed, the attorney would not be allowed to churn the matter to obtain a larger attorney fee award. The case is inapposite to this proceeding. Coppedges never admitted a debt and the issue is not one of whether Jorgensen's counsel spent unneeded time on the matter to increase the amount of the fee recovery.

Coppedges claim it was error for the trial court to rely upon Rule 408, I.R.C.P. and refuse to consider their submittals.[8] The trial court's disregard of Coppedges' settlement negotiation submittals was not error.

The mediation agreement signed by the parties in this matter indicated the parties agreed the fact of mediation and statements made therein were not admissible. LR p. 66. Rule 408, I.R.E. is clear that evidence of compromise negotiations is not admissible. Likewise, I.R.E. 507, provided that mediation communications were privileged and

[8] On July 1, 2008, the Idaho legislature enacted the Uniform Mediation Act, Title 9, Chapter 8, which also supports the trial court's decision.

inadmissible in a proceeding unless the other party agreed to waive the privilege.[9]

Coppedges' position that a trial court should consider settlement negotiations in determining prevailing parties or fee apportionment would potentially chill settlement negotiations. It would add the concern that if a party engaged in such negotiations that they might be used against the party in an attorney fee analysis. Further, there would be fear that a party might not accurately represent the course of the negotiation to the court in its attempt to obtain or avoid fees, which would lead to further litigation costs and expenses. Finally, to allow this factor to become part of the attorney fee analysis would invite exactly the type of activity that *Ross v. Coleman,* 114 Idaho 817, 761 P.2d 1169, (1988), warned against, which is the authority for a trial court to oversee, or second guess settlement negotiations. The trial court did not abuse its discretion and commit error in declining to consider this factor.

F. Coppedges are not Entitled to a Remand on the Issue of Apportionment for Post-Trial Matters

On appeal, Coppedges claim at a minimum that they were entitled to an award for post-trial briefing and hearing on motions because they did not involve their counterclaims. In other words, Coppedges claim that the trial court abused its discretion by not apportioning them these costs. In making these arguments, the Coppedges do not demonstrate that the trial court acted outside the boundaries of its discretion or did not reach its decision through an exercise of reason.

[9] I.R.C.P 507 was changed during the time the attorney fee matter was before the court. However, either version provided that the communication was privileged and inadmissible.

V. ATTORNEY FEES

On appeal, Coppedges correctly note that *Daisy Mfg. Co., Inc. v. Paintball Sports,* 134 Idaho 259, 263 (Ct. App. 2000) stands for the proposition that when an appeal subject to I.C. § 12-120 concerns the entitlement to fees as opposed to an award of fees on appeal that the prevailing party in the appeal is entitled to attorney fees. However, Coppedges appeal goes to the award of fees and they are not entitled to fees on appeal.

SUBMITTED this 18th day of March, 2009.

JAMES, VERNON & WEEKS, P.A.

Susan P. Weeks

SUSAN P. WEEKS

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 18th day of March, 2009, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to all counsel of record as follows:

Charles R. Dean, Jr.
Dean & Kolts
1110 West Park Place, Ste. 212
Coeur d'Alene, ID 83814

- ☑ U.S. Mail
- ☐ Hand Delivered
- ☐ Overnight Mail
- ☐ Telecopy (FAX) 208) 446-1621

Christine Hmose